STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER DICKINSON and TAMMY DICKINSON,

Plaintiffs-Appellants,

v

LIMP BIZKIT, LIMP BIZNESS, INC., FRED DURST, WES BORLAND, SAM RIVERS, D.J. LETHAL, JOHN OTTO, PALACE SPORTS AND ENTERTAINMENT, INC., SFX ENTERTAINMENT, INC., SFX TOURS, INC., and CELLAR DOOR ENTERTAINMENT, INC.,

Defendants-Appellees,

and

TENABLE PROTECTIVE SERVICES, INC., and GALLAGHER SECURITY, INC.,

Defendants.

UNPUBLISHED
June 29, 2004

No. 244021
Oakland Circuit Court
LC No. 2001-033188-NO

Before: Saad, P.J., and Sawyer and Hood, JJ.

PER CURIAM.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff[1] appeals from the trial court's order that granted defendants' motions for summary disposition, and we affirm.

[1] Plaintiff Tammy Dickinson's interest in this case is derivative of that of plaintiff Christopher Dickinson. For convenience, in this opinion the designation "plaintiff" will refer exclusively to the latter.

During a concert that featured the band Limp Bizkit, an unknown assailant kicked plaintiff in the head while he worked as a paramedic at the Palace of Auburn Hills. At the performance, the band's lead vocalist, defendant Fred Durst, invited patrons in the stands to disregard security and come down to the main floor. During the resulting crowd surge, an unidentified third party kicked plaintiff in the head. Plaintiff brought suit, alleged various theories of negligence, assault and battery, intentional infliction of emotional distress, and civil conspiracy, and named as defendants the individual members of Limp Bizkit, the band itself as a partnership, the band's corporate entity,[2] the promoters of the concert in question, and two security services.

The trial court granted summary disposition to all defendants. The court stated that "*it cannot be disputed that [plaintiff] was injured as a result of a criminal act by a third party*," and concluded that "*this case involves a single concertgoer assaulting another invitee on the premises, not the propensity of a band to stir up a crowd*."[3]

II. STANDARD OF REVIEW

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). The court considers the pleadings, affidavits, and other evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Id.* "The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* To recover in negligence, a plaintiff must prove duty, breach, causation, and damages. *Schuster v Sallay*, 181 Mich App 558, 562; 450 NW2d 81 (1989). We agree with the trial court that plaintiff's injury did not result from a breach of duty on Durst's part.

III. ANALYSIS

A. DUTY

Plaintiff argues that the trial court erred in failing to recognize that Durst had a duty to plaintiff to refrain from inviting audience members to migrate to the main floor, or at least that this proposition constitutes a question of fact for jury resolution. "Generally, an individual has no duty to protect another who is endangered by a third person's conduct." *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997).[4] "'Generally, there is no duty to protect another from

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[2] Plaintiff conceded below, as he does on appeal, that the corporate form of the band obviates any claims against its members on a partnership theory.

[3] Plaintiff does not challenge the granting of summary disposition to the two security companies, and so the latter are not participating in this appeal.

[4] The major exception is where a "special relationship" exists, between the defendant and either the victim or the third party. *Murdock*, *supra* at 54. However, plaintiff concedes that no such special relationship existed in this case.

the criminal acts of a third party in the absence of special circumstances.'" *Krass v Tri-County Security, Inc*, 233 Mich App 661, 668; 592 NW2d 578 (1999), quoting *Tame v A L Damman Co*, 177 Mich App 453, 455-456; 442 NW2d 679 (1989). Here, the sole eyewitness described the offense in the following terms: "The AMR medic . . . got socked soccer hit style. . . . Like you're kicking a soccer ball or football, just a big kick. . . . [C]ame from the stand, came over top, kicked him in the head." Because the only admissible evidence shows that plaintiff's injury was the result of an intentional kick to the head, we conclude that the trial court did not fail in its obligation to construe the evidence in plaintiff's favor when the court characterized that kick as a third party's criminal act. The duty to construe the evidence in plaintiff's favor does not extend to presuming an accident where, as here, the only admissible evidence clearly shows that a battery caused the injury.[5] Therefore, defendant Durst is not liable for the intentional criminal conduct that caused plaintiff's injuries.[6]

It is not inherent in surging crowds that a rogue might commit an intentional criminal act of physical violence upon another patron or security officer. Plaintiff's broad sense of what kind of duty should obtain in this case would make a performer at a rock concert the insurer of all concertgoers against acts of physical aggression from each other. The trial court properly rejected this view of duty. The thug who kicked plaintiff in the head violated his duty to plaintiff and, if caught, should be held accountable.[7]

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[5] To put it another way, where there was only one description of how plaintiff suffered his injury, the trial court was not obliged to ignore clear evidence of intentional conduct within that account and then imagine that the resultant injury may somehow have been caused by accident.

[6] Plaintiff repeatedly characterizes what ensued at Durst's invitation as a riot. However, MCL 752.541 defines "riot" as when "5 or more persons, acting in concert, . . . wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm." Had Durst incited a bona fide riot, then wanton violence in the melee might indeed be attributed to him. However, although inviting audience members to relocate in disregard of the venue's rules obviously shows poor judgment, such action is not violent conduct. Moreover, plaintiff points to evidence of aggression and ribaldry, not "public terror or alarm." Also, in the course of inviting the fans to come to the floor, Durst cautioned them, as the trial court recounted, "to calm down, to not hurt anyone, to take care of one another and 'if you see somebody fall, pick [']em up.'" For these reasons, the trial court properly recognized that the evidence did not support the conclusion that Durst incited a riot.

[7] Plaintiff additionally grafts onto his discussion of duty a cursory argument that the trial court erred in dismissing the assault and battery claim against Durst, and a more detailed one that the court erred in dismissing the claim of intentional infliction of extreme emotional distress. Neither of these issues is germane to the question presented—whether Durst violated a duty to plaintiff, which obviously invokes the tort of negligence. We thus decline to consider these ancillary arguments. See MCR 7.212(C)(7); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). They are without merit in any event, owing to plaintiff's failure to show that his injury was caused by any breach of duty attributable to Durst.

B. CAUSATION

Nor could Durst's actions reasonably be considered the cause of plaintiff's injury. Although an intervening act of a third person is not deemed a superceding cause of an injury if that intervening act was foreseeable, *David v Thornton*, 384 Mich 138, 148; 180 NW2d 11 (1970), an instance of random intentional and criminal physical violence is not a foreseeable consequence of inviting concertgoers to flout house policy and come to the main floor. And, because Durst was not liable in the matter, there is no liability to extend to Durst's bandmates, the band's corporate embodiment, or the promoters of the concert, on theories of vicarious liability.

Nor is the venue itself, defendant Palace, responsible for plaintiff's injury on a premises liability theory. Where a situation arises at an entertainment venue that poses a risk of imminent and foreseeable harm to identifiable invitees, the venue's duty in response "is limited to reasonably expediting the involvement of the police." *MacDonald v PKT, Inc*, 464 Mich 322, 326; 628 NW2d 33 (2001). "[T]here is no duty to otherwise anticipate and prevent the criminal acts of third parties." *Id*.[8]

In sum, because plaintiff's injury was caused by a third party's intentional, criminal conduct, which is not attributable, as a matter of duty or causation, to Durst's conduct, plaintiff's claims against defendants were properly dismissed.[9]

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

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[8] Plaintiff asserts that, the decision in *MacDonald* notwithstanding, defendant Palace, "armed with advance knowledge that Durst had a practice of calling people out of their seats and with advance knowledge that this mass movement of people could be dangerous at the Palace, had both the duty and the ability to prevent this from taking place." However, by claiming that defendant Palace failed in some duty to prevent Durst from calling the fans to the floor, plaintiff attempts to transform what the evidence suggests was a matter of concern and policy into a legally enforceable duty. Indeed, Palace officials advised the promoters of the concert that they did not wish to aggravate the dangers inherent in a rock concert by allowing patrons to migrate to the floor en masse. Importantly, the evidence does not suggest that such a development itself created a sufficiently certain and unreasonable risk that such activity would include intentional criminal conduct.

[9] At oral argument in this case, we asked the parties to file supplemental briefs on the issue of whether there was any authority dealing with the issue of liability for an entertainer who allegedly incited an audience to commit wrongful acts. Having been provided with no such authority, we conclude that defendants had no duty to protect against third-party criminal acts, and that there is no question on this record that plaintiff was a victim of a third-party criminal act.